COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 03878601**

Roma T. Raczkowski	Employee
Center for Extended Care at Amherst	Employer
Mass Care Self-Insurance Group	Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Carroll)

APPEARANCES
Michael J. Moriarty, Esq., for the employee
Robert J. Riccio, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief

HORAN, J. The administrative judge found that Roma Raczkowski, age fifty-three, emigrated to the United States from Poland approximately thirty years prior to her industrial injury. Though she had obtained the equivalent of an associate's degree in stenography in Poland, she has no typing or computer skills transferable to this country. After emigrating, the employee worked in a factory, and then as a home case/nursing assistant for approximately twenty years. In 1999, she began working at the Center for Extended Care as a nursing assistant. Her job involved taking care of patients, including lifting them as necessary. (Dec. 2.)

The judge found the employee injured her back at work on September 25, 2001. (Dec. 5.) The § 11A physician, Dr. Dasco, opined the employee suffered from degenerative disc disease with spinal stenosis at L4-5, which was aggravated by her work, and a herniated disc at L5-S1, which was probably related to the work injury. He further opined the work injury remained a major cause of her disability. He believed surgery would likely be necessary if her pain did not

improve with further conservative treatment, and that she was not able to do heavy work or lifting.[1] (Dec. 4.)

The insurer appeals an award of ongoing § 34 temporary total incapacity and medical benefits. It raises four issues, which we address in turn.

The first two issues concern the judge's rejection of the employer's job offer. During her initial period of incapacity, the employer attempted to accommodate her. (Dec. 3, Tr. 66, 90-91.) However, after the insurer denied payment of G. L. c. 152 benefits, the employer withdrew its offer of modified work. (Dec. 3, 5, Tr. 66, 90-91, 96-97.) The employer's representative at hearing, Ms. Joanne Tomlinson, testified the initial job offer was withdrawn because it was the employer's policy to accommodate only employees who were injured at work. (Dec. 3, 5, Tr. 90-91, 96-97.) At the hearing on November 21, 2002, while maintaining its denial of liability, a more recent job offer was discussed.[2] (Dec. 2-3, 5.) The judge found that Ms. Tomlinson, who testified she was responsible for setting up modified duty, was "unclear about the details of a job offer put out in November of 2002." (Dec. 3; Tr. 97.) The administrative judge found:

> While the impartial physician does opine that Ms. Raczkowski might be able to do an accommodated light duty job with duties suggested in Ins.#3, the job itself is not one that I find to be bona fide. The testimony of Joanne Tomlinson made it clear that after the insurer denied coverage in the fall of 2001, the offer of accommodated work was withdrawn. It did not reappear in any form until just prior to hearing, and at hearing Ms. Tomlinson was only vaguely aware of the new offer, if indeed there was a new offer. I am not persuaded that a new offer was made to Ms. Raczkowski.

[1] Despite the insurer's denial of the claim on liability and causal relationship grounds ab initio, the findings on these issues are unchallenged on appeal.

[2] This second offer apparently had been made to the employee on November 15, 2002, just a few days prior to the hearing. (Dec. 5; Tr. 111-112; Ins. Exh. 3.) We note that Ins. Exh. 3 consists of a half-page list of modified job responsibilities with the employee's name on it; it is not a letter addressed to the employee offering her a position; it makes no mention of wages. Ms. Tomlinson also indicated this job offer was based upon restrictions contained in a medical report, which was not in evidence, from the insurer's examiner, Dr. Caulkins, and not on the impartial medical examiner's opinion. (Tr. 99.)

(Dec. 5.) The judge concluded that, in the absence of a bona fide job offer, the employee would be unlikely to find work in the open labor market, given her age, education and work background. (Dec. 6.)

The judge's findings on credibility are final, as long as they are based on the evidence and reasonable inferences drawn therefrom. Walsh v. Hollstein Roofing, Inc., 17 Mass. Workers' Comp. Rep. 333, 339 (2003); see Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). Here, the judge simply did not credit the employer's witness that a good faith offer of employment had been made. The hearing decision and the record reveal the basis for the judge's rejection of Ms. Tomlinson's testimony concerning the job offer. Ms. Tomlinson's testimony was at best equivocal. Not only did she indicate that an initial offer forwarded to Ms. Raczkowski was *not* based on the restrictions imposed by the impartial medical examiner, but she also testified she would "need more clarification" to determine whether the employer could still accommodate Ms. Raczkowski:

> Q: Ms. Tomlinson, did you ever send a modified job duty job offer to Ms. Raczkowski?
>
> A: Yes.
>
> Q: When you did so, on what did you base those restrictions?
>
> A: Based those restrictions on the IME done by Dr. Caulkins.
>
> Q: Not—so these restrictions weren't based on the restrictions of Dr. Dasco?
>
> A: I didn't follow Dr. Dasco. I didn't contact him.
>
> . . . .
>
> Q: Now, have you reviewed Dr. Dasco's report, job offer which had been extended to Ms. Raczkowski using the restrictions given by some other physician, other than Dr. Dasco, are they still applicable?

A: I believe so.

. . . .

Q: Would Extended Care be able to accommodate Ms. Raczkowski, given her testimony today, meaning you heard what she indicated what she was capable of. Given all of that would Extended Care still be able to accommodate Ms. Raczkowski?

A: I believe we could. I would need more clarification.

(Tr. 99-101.)

Moreover, given the employer's admitted policy to accommodate only employees injured at work, it was reasonable for the judge to question the validity of any offer while liability remained in dispute. (Dec. 3, 5, Tr. 90-91, 96-97.)

Lastly, the judge was troubled that the employer did not revive its attempt to accommodate the employee until "just prior to the hearing."[3] (Dec. 5.) Because the judge's rejection of the job offer is supported by the record, and is reasonable, we lack the authority to disturb this finding on appeal. G. L. c. 152, § 11C; compare Frey v. Mulligan Inc., 16 Mass. Workers' Comp. Rep. 364 (2002) (proper to recommit case denying compensation where credibility findings were not shown to bear a reasonable relationship to the issues in dispute).

The insurer's second argument contends the judge failed to apply § 35D, as the employee was offered a suitable and available job.[4] Because the judge found, in effect, that no legitimate job offer was made, the point is moot.[5] G. L. c. 152,

[3] We do not mean to suggest that, as a matter of *law*, the timing of a job offer ipso facto is determinative of whether it is bona fide.

[4] G. L. c. 152, § 35D(3), provides, in relevant part, that the employee's earning capacity shall be: "The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made *available* to the employee and he is capable of performing it." (Emphasis added.)

[5] Similarly, because the judge disbelieved Ms. Tomlinson's testimony that there was a job available, the impartial examiner's opinion that the employee could perform the duties as outlined in the offer is not controlling.

§ 35D(3); see Mello v. Bristol County Sheriff's Office, 16 Mass. Workers' Comp. Rep. 376, 377 (2002) (under § 35D(3) job must actually be "available" as well as "suitable").

The insurer's third argument challenges the judge's award of total incapacity benefits to an employee who failed to show attempts to secure employment post injury. In Giannakopoulos v. Boston College, 18 Mass. Workers' Comp. Rep. ___ (September 27, 2004), overruling White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999), we held that evidence of attempts to secure employment is not necessary to prevail on a claim for total incapacity benefits.

Finally, we summarily affirm the decision with respect to the judge's vocational analysis, and dismiss the insurer's final argument on this point, as we are satisfied the judge adequately assessed how the medical and vocational factors combined to support an award of § 34 benefits. (Dec. 6.)

Accordingly, we affirm the decision of the administrative judge. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: November 30, 2004

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William A. McCarthy
Administrative Law Judge